EDITOR'S NOTE

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Supreme Court, U.S.
FILED
OCT 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

No. 90-417

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ALAN S. KRAMER,

Petitioner,

vs.

GAINES W. HAMMOND, JR.,

Respondent.

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SUPREME COURT, U.S.

MOTION TO DEFER CONSIDERATION OF PETITION FOR CERTIORARI

Petitioner respectfully moves the Court for an order deferring consideration of the petition for a writ of certiorari in the above-captioned matter until final disposition of a related action, Kramer v. Hammond, 90 Civ. 5226 (KTD) (S.D.N.Y., Aug. 10, 1990), in which petitioner is seeking enforcement of an arbitration agreement. If this dispute is resolved through arbitration, the petition will be moot and petitioner will move to dismiss the petition pursuant to Rule 46.

Procedural History

Respondent, Hammond, filed the case below in the Court of Common Pleas of Spartanburg County, South Carolina on March 12,

- 76 pp

1986. Petitioner, Kramer, moved to dismiss Hammond's complaint for lack of personal jurisdiction on April 8, 1986. Because he moved to dismiss, Kramer was not required to answer the complaint pending resolution of his motion by the trial court. By order dated August 8, 1987, the trial court denied Kramer's motion to dismiss. On January 22, 1990, the South Carolina Supreme Court affirmed the trial court decision, and on June 11, 1990, it denied Kramer's petition for rehearing. Kramer was not required to answer the complaint while his appeal and rehearing petition were pending in the South Carolina Supreme Court.

On August 9, 1990, Kramer served and filed his answer to Hammond's complaint, specifically asserting as an affirmative defense the existence of an arbitration agreement barring Hammond's claims.* On August 10, 1990, Kramer commenced an action against Hammond in the United States District Court for the Southern District of New York pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., requesting an order enforcing the arbitration agreement, which requires binding arbitration in New York City pursuant to the Rules of the American Arbitration Association. Kramer v. Hammond, 90 Civ. 5226 (KTD) (S.D.N.Y., Aug. 10, 1990). (Kramer's petition to compel arbitration and Hammond's answer to that petition are attached hereto as Exhibits "A" and "B").

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*After his petition for rehearing was denied, Kramer moved for a continuation of the stay of proceedings against him, including his time to answer, pending filing and determination of a petition for a writ of certiorari in this Court. On July 11, 1990, Kramer's request for a stay pending petition to this Court was denied by the South Carolina Supreme Court.

Reasons for Granting the Motion

Kramer's time to file a petition for a writ of certiorari to review the decision of the South Carolina Supreme Court was running while his petition to compel arbitration was pending in the Southern District of New York. Hammond's answer to the petition to compel arbitration was not due until the last day of the ninety-day period to petition this Court. Since the arbitration petition could not be decided prior to the certiorari deadline, Kramer had two procedural choices. Either he could move for an extension of his time to file a certiorari petition, or he could file a timely certiorari petition and move to defer consideration of the petition pending determination of his petition to compel arbitration. Because final disposition of his petition to compel arbitration was unlikely even with a full sixty-day extension,** Kramer chose the latter option.

Accordingly, if the motion to defer is granted, and this dispute proceeds to arbitration, consideration of Kramer's petition for a writ of certiorari will be unnecessary. If arbitration is denied, however, consideration of Kramer's certiorari petition will be necessary.

For the above reasons, petitioner requests that an order be entered deferring consideration of his petition for certiorari

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**The governing statute and rule only permit an extension "for a period not exceeding sixty days," 28 U.S.C. § 2101(c); Rule 13.2, and a full sixty-day extension is granted only in "the most compelling situations." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 6.7(c), at 322 (6th ed. 1986).

Rev. 1/90

PETITIONER	RESPONDENT
ALAN S. KRAMER	GAINES W. HAMMOND

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	ATTORNEYS (IF KNOWN)
JACKSON & NASH (212) 370-8100 330 Madison Avenue New York, New York 10017	

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

Petition to Compel Arbitration under 9 U.S.C. Section 1 et seq.

Has this or a similar cause been previously filed in SDNY at anytime? No ☒ Yes ☐ Judge Previously Assigned _____

If yes, was this case Vol. ☐ Invol. ☐ Dismissed. No ☐ Yes ☐ If yes, give date _____ & Case No. _____

(PLACE AN ☒ IN ONE BOX ONLY)

NATURE OF SUIT

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
[ ] 110 INSURANCE [ ] 120 MARINE [ ] 130 MILLER ACT [ ] 140 NEGOTIABLE INSTRUMENT [ ] 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT [ ] 151 MEDICARE ACT [ ] 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL. VETERANS) [ ] 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS [ ] 160 STOCKHOLDERS' SUITS [ ] 190 OTHER CONTRACT [ ] 195 CONTRACT PRODUCT LIABILITY	PERSONAL INJURY [ ] 310 AIRPLANE [ ] 315 AIRPLANE PRODUCT LIABILITY [ ] 320 ASSAULT, LIBEL & SLANDER [ ] 330 FEDERAL EMPLOYERS' LIABILITY [ ] 340 MARINE [ ] 345 MARINE PRODUCT LIABILITY [ ] 350 MOTOR VEHICLE [ ] 355 MOTOR VEHICLE PRODUCT LIABILITY [ ] 360 OTHER PERSONAL INJURY PERSONAL INJURY [ ] 362 PERSONAL INJURY-MED MALPRACTICE [ ] 365 PERSONAL INJURY PRODUCT LIABILITY [ ] 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY PERSONAL PROPERTY [ ] 370 OTHER FRAUD [ ] 371 TRUTH IN LENDING [ ] 380 OTHER PERSONAL PROPERTY DAMAGE [ ] 385 PROPERTY DAMAGE PRODUCT LIABILITY	[ ] 610 AGRICULTURE [ ] 620 FOOD & DRUG [ ] 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881 [ ] 630 LIQUOR LAWS [ ] 640 R.R. & TRUCK [ ] 650 AIRLINE REGS [ ] 660 OCCUPATIONAL SAFETY/HEALTH [ ] 690 OTHER LABOR [ ] 710 FAIR LABOR STANDARDS ACT [ ] 720 LABOR/MGMT. RELATIONS [ ] 730 LABOR/MGMT REPORTING & DISCLOSURE ACT [ ] 740 RAILWAY LABOR ACT [ ] 790 OTHER LABOR LITIGATION [ ] 791 EMPL. RET. INC. SECURITY ACT	[ ] 422 APPEAL 28 USC 158 [ ] 423 WITHDRAWAL 28 USC 157 PROPERTY RIGHTS [ ] 820 COPYRIGHTS [ ] 830 PATENT [ ] 840 TRADEMARK SOCIAL SECURITY [ ] 861 HIA(1395FF) [ ] 862 BLACK LUNG(923) [ ] 863 DIWC(405(g) [ ] 863 DIWW(405(g)) [ ] 864 SSID TITLE XVI [ ] 865 RSI(405(g)) FEDERAL TAX SUITS [ ] 870 TAXES [ ] 871 IRS-THIRD PARTY 26 USC 7609	[ ] 400 STATE REAPPORTIONMENT [ ] 410 ANTITRUST [ ] 430 BANKS & BANKING [ ] 450 COMMERCE/ICC RATES/ETC. [ ] 460 DEPORTATION [ ] 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATION ACT (RICO) [ ] 810 SELECTIVE SERVICE [ ] 850 SECURITIES/COMMODITIES/EXCHANGE [ ] 875 CUSTOMER CHALLENGE 12 USC 3410 [ ] 891 AGRICULTURAL ACTS [ ] 892 ECONOMIC STABILIZATION ACT [ ] 893 ENVIRONMENTAL MATTERS [ ] 894 ENERGY ALLOCATION ACT [ ] 895 FREEDOM OF INFORMATION ACT [ ] 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE [ ] 950 CONSTITUTIONALITY OF STATE STATUTES [X] 890 OTHER STATUTORY ACTIONS

ACTIONS UNDER STATUTES

REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS
[ ] 210 LAND CONDEMNATION [ ] 220 FORECLOSURE [ ] 230 RENT LEASE & EJECTMENT [ ] 240 TORTS TO LAND [ ] 245 TORT PRODUCT LIABILITY [ ] 290 ALL OTHER REAL PROPERTY	[ ] 441 VOTING [ ] 442 EMPLOYMENT [ ] 443 HOUSING/ ACCOMMODATIONS [ ] 444 WELFARE [ ] 440 OTHER CIVIL RIGHTS	[ ] 510 MOTIONS TO VACATE SENTENCE 28 USC 2255 [ ] 530 HABEAS CORPUS [ ] 535 DEATH PENALTY [ ] 540 MANDAMUS & OTHER [ ] 550 CIVIL RIGHTS

Check if demanded in complaint

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ $6.5 million arbitration OTHER

Check YES only if demanded in complaint

JURY DEMAND: ☐ YES ☒ NO

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y.?

IF SO, STATE:

JUDGE _____ DOCKET NUMBER _____

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

(SEE REVERSE)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

ALAN S. KRAMER,

Petitioner,

V.

GAINES W. HAMMOND,

Respondent.

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

90 CIV. 5226

TO: (Name and Address of Defendant)

Gaines W. Hammond
391 Serpentine Drive
Spartanburg, South Carolina 29305

JUDGE DUFFY

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PETITIONER'S ~~PLAINTIFF'S~~ ATTORNEY (name and address)

JACKSON & NASH
330 Madison Avenue
New York, New York 10017

an answer to the ~~complaint~~ petition which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

AUG 1 0 1990

RAYMOND F. BURGHARDT, CLERK

CLERK

DATE

BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between	
ALAN S. KRAMER, Petitioner,	__ Civ. ____ VERIFIED PETITION TO COMPEL ARBITRATION
and	
GAINES W. HAMMOND, Respondent.	

The Petition of Alan S. Kramer respectfully shows:

THE PARTIES

1. Petitioner is a citizen of the State of New York and a resident of the City and County of New York.

2. Upon information and belief, respondent is a citizen of the State of South Carolina.

JURISDICTION AND VENUE

3. This Petition is brought for relief under the Federal Arbitration Act (9 U.S.C. §1 et seq.).

4. The jurisdiction of this Court is based upon the diversity of citizenship of the parties pursuant to 28 U.S.C. §1332. The matter in controversy exceeds the sum of $50,000 exclusive of interest and costs.

5. This Court has jurisdiction over the person of respondent and venue lies in this District by virtue of respondent's agreement to arbitrate the dispute between the parties in New York City and by virtue of his having commenced

an action against petitioner involving that dispute in the Supreme Court of the State of New York, County of New York entitled Gaines W. Hammond v. Alan S. Kramer, Index No. 21813/87 (the "New York Action").

6. The Arbitration Agreement herein is within the scope of the Federal Arbitration Act because the controversy draws into issue transactions involving commerce between the States. Interstate commerce is involved in that the dispute pertains to subscriptions for the stock of a Delaware corporation by citizens of New York, South Carolina, California and other States and involves the transfer by license of technology owned by citizens of the State of California to such Delaware corporation pursuant to an option obtained by respondent who was then a citizen of South Carolina.

FACTS

7. In September 1984, respondent entered into an option to license a technology for the non-invasive shattering of kidney stones by extracorporeal shockwave lithotripsy. The option was granted by the inventors of that technology, citizens of California ("California Inventors"). The license was to be granted to a Delaware corporation, Hammond Technologies, Inc., which changed its name to Medstone International, Inc. ("Medstone"). Simultaneously, Medstone agreed to sublicense the technology for the State of California to a corporation formed by the California Inventors.

8. At or about the same time the option was entered

into, in September 1984, Medstone was formed and a Subscription Agreement for its stock was entered into by respondent, petitioner, the California Inventors and others. A copy of such Subscription Agreement is annexed hereto as Exhibit "A" and is hereinafter referred to as the "Original Subscription Agreement".

9. At or about the time the Original Subscription Agreement was entered into, petitioner, respondent, the California Inventors and others entered into an Arbitration Agreement which provided, in pertinent part as relevant here, that ". . . any dispute arising between the parties in which this Agreement [the 'Subscription Agreement'] or its interpretation is in issue . . . shall be settled by arbitration in New York City in accordance with the rules of the American Arbitration Association. . . ." The Arbitration Agreement is annexed hereto as Exhibit "B".

10. The option by its terms was to expire on November 8, 1984. On that date, it expired without being exercised. Shortly thereafter, the parties to the Original Subscription Agreement entered into a revised subscription agreement (the "Revised Subscription Agreement") which amended the provisions of the Original Subscription Agreement. A copy of the Revised Subscription Agreement is annexed hereto as Exhibit "C".

11. Among the changes provided for in the Revised Subscription Agreement was a reallocation of the subscription rights in Medstone pursuant to which respondent's interest was

reduced and those of the California Inventors and petitioner were increased.

LAWSUITS COMMENCED BY RESPONDENT AND PROCEDURAL HISTORY

12. In March 1986, respondent sued his former attorneys and petitioner in South Carolina (the "South Carolina Action") alleging that petitioner, who had acted as counsel for the California Inventors with respect to the option, license, sublicense, Original and Revised Subscription Agreements, had conspired with respondent's South Carolina counsel to reduce respondent's subscription interest in Medstone and had caused such reduction by fraud, breach of fiduciary duty and negligence. A copy of the complaint in the South Carolina Action is annexed hereto as Exhibit "D".

13. Petitioner immediately moved to dismiss the South Carolina complaint for lack of personal jurisdiction.

14. In August 1987, the South Carolina Court of Common Pleas found jurisdiction over petitioner.

15. In September 1987, respondent commenced the New York Action. The allegations in the New York Action are substantially similar to the claims asserted in the South Carolina Action. A copy of the complaint in the New York Action is annexed hereto as Exhibit "E".

16. Thereafter, petitioner moved for summary judgment in the New York Action. In response, the court stayed the action pending disposition of petitioner's appeal of the jurisdictional motion in South Carolina.

17. The denial of petitioner's jurisdictional motion in South Carolina was affirmed in January, 1990 and a petition for rehearing was denied by the South Carolina Supreme Court in June, 1990.

18. Petitioner has made an oral demand on respondent to arbitrate pursuant to the Arbitration Agreement and respondent has not replied to such demand.

19. Petitioner answered the South Carolina Action complaint on August 10, 1990, and asserted the agreement to arbitrate as an affirmative defense. A copy of the answer in the South Carolina Action is annexed hereto as Exhibit "F".

ARBITRABILITY

20. The South Carolina Action and New York Action complaints involve a dispute in which the parties' subscription interest is in issue. Respondent's essential claim in both the New York and South Carolina Actions is that respondent is entitled to more than the subscription interest he received under the Original and Revised Subscription Agreements. Specifically, respondent alleges that (a) he should have received rights to subscribe to 70,000 Medstone Common Stock in the original Subscription Agreement and was allocated only 35,000, that he agreed to accept the lesser amount in reliance on the alleged misrepresentation of one of his South Carolina lawyers that he would be able to control Medstone, and (b) that petitioner and respondent's South Carolina lawyers conspired to allow the option to expire thereby giving the California

Inventors the right to reset subscription allocations, and that in the reallocations respondent was reduced from 35,000 to 10,000 subscription rights. The claims asserted by respondent are within the scope of the parties Arbitration Agreement.

21. No previous application has been made for the relief sought herein.

WHEREFORE, petitioner requests that this Court:

(a) issue an order compelling respondent to arbitrate the disputes under the South Carolina and New York complaints pursuant to 9 U.S.C. §4; and

(b) award to petitioner such other equitable and legal relief to which petitioner may be entitled under the Federal Arbitration Act or as otherwise provided.

Dated: New York, New York
August 10, 1990

JACKSON & NASH

By: _____
Jeffrey G. Steinberg (JS-[illegible])
Attorneys for Petitioner
330 Madison Avenue
New York, New York 10017
(212) 370-8100

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALAN S. KRAMER, being duly sworn, deposes and says:

I am the petitioner in the within proceeding; I have read the Petition to Compel Arbitration and know the contents thereof; and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ALAN S. KRAMER

Sworn to before me this
~~9th~~ 11th day of August, 1990

Notary Public

LISA S. TANKOOS
Notary Public, State of New York
No. 31-4849066
Qualified in New York County
Commission Expires March 30, 19 91

The undersigned agree that the Subscription Agreement between the undersigned for common stock of Hammond Technology, Inc., the Option for License Agreement between Errol Payne, Richard Penfil and Charles McGregor on the one part and Gaines W. Hammond on the other part ("Option Agreement"), and the License Agreement and Sublease Agreement which are Exhibits B and D respectively to the Option Agreement, shall each be subject to the provisions for arbitration annexed hereto as Exhibit A as if fully set forth in each of such Agreements.

This Agreement is effective the date of the Agreement it supplements.

Gaines W. Hammond, Jr. M.D.

Errol Payne

Richard Penfil M.D.

Charles McGregor

Thomas A. Evins, Esq.

Alan S. Kramer, Esq.

Gary P. Clisham

David Blunt

Tom Gardner

ARBITRATION. (a) Except as provided in Subsection (b), any dispute arising between the parties in which this Agreement or its interpretation is in issue or alleging any breach thereof shall be settled by arbitration in New York City in accordance with the rules of the American Arbitration Association then in effect, by three arbitrators selected by the Association from its panel of arbitrators. Judgment upon the award of the arbitrator may be entered in any court of competent jurisdiction.

(b) In the event that any party is entitled to equitable relief in the form of a temporary restraining order, preliminary injunction or attachment in a dispute among them which is arbitratable under subparagraph (a), such party may nevertheless commence an action solely for the purpose of obtaining such preliminary relief but the dispute between the parties giving rise to the claim as to which preliminary relief is sought shall nevertheless be settled by arbitration whether or not such preliminary relief is granted. Such preliminary relief may be sought prior to or at the time of commencing an arbitration proceeding or during its pendency when a proper basis therefore exists under the laws of the jurisdiction from whose courts such relief is sought.

Exhibit A

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG) 86-CP-42-574

Gaines W. Hammond, Jr.,)
)
Plaintiff,)
)
vs.)
)
Butler, Means, Evins and)
Browne, Thomas A. Evins,) ANSWER OF DEFENDANT ALAN S. KRAMER
Stanley T. Case, and)
Alan S. Kramer,)
)
Defendants.)

Subject to his Rule 12(e) motion, filed herewith, defendant Alan S. Kramer answers the complaint of the plaintiff as follows:

FIRST DEFENSE

1. Denied for lack of information and belief, except admitted, upon information and belief, that plaintiff was engaged in the practice of urology from August 1984 through November 1984.

2. This defendant is not sufficiently aware of the legal composition of Butler, Means, Evins & Browne, or the duties of its individual members, to respond affirmatively to the allegations of paragraph 2, and they are therefore denied. Defendant admits that plaintiff introduced Thomas A. Evins and Stanley T. Case to him as plaintiff's attorneys.

3. Admitted only that defendant Kramer is an attorney licensed to practice law and living in the State of New York. The remaining allegations are emphatically denied.

4. Denied for lack of information and belief, except admitted that plaintiff introduced Evins and Case as his

attorneys and Evins and Case negotiated with defendant as counsel for the California Group with respect to an Option Agreement, a License Agreement, a Sub-license Agreement and a Subscription Agreement.

5. Admitted, except that Payne, Penfil and McGregor were, to the best of defendant's knowledge, the only inventors of the technology described, and the option obtained by plaintiff was required to be assigned to a corporation.

6. Admitted.

7. Admitted that the Option Agreement had various requirements but denied that the option exercise price was $1,200,000. Reference should be made to the Option Agreement for its terms and conditions and to the License Agreement for the royalty to be paid upon exercise of the Option Agreement.

8. Admitted that the quoted terms are part of the Option Agreement, although not quoted accurately, and reference should be made to the Option Agreement for the terms thereof.

9. Denied, except admitted that plaintiff met with the California Group, and defendant further alleges that the purpose of the meeting was not solely to form a corporation, that the purpose of the corporation was not solely to market the technology, and that a corporation, not the plaintiff, was the party to acquire licensing rights in the technology. Plaintiff's intent is denied for lack of information and belief.

10. Admitted that Evins and Case represented plaintiff and defendant represented the California Group in the negotiations

between plaintiff and the California Group in August and September 1984.

11. Denied.

12. Denied.

13. Denied, and reference is made to the Subscription Agreement with an "as of" execution date of August 30, 1984 for the terms and conditions applicable to the parties.

14. Denied for lack of information and belief.

15. Denied for lack of information and belief.

16. Denied in that plaintiff's alleged "belief" would have been directly contrary to the contract documents.

17. Admitted only that plaintiff freely and voluntarily signed the subscription agreement.

18. Denied for lack of information and belief, except denied that plaintiff reasonably could have believed that he would control a majority of the corporation, and denied that the Subscription Agreement was drafted by his attorneys, and reference is made to the Subscription Agreement to ascertain the terms thereof.

19. Denied, except denied for lack of information and belief as to the allegations concerning representations made to plaintiff by Irvine and Case, and denied that any such representations were material in that plaintiff could not have reasonably relied upon any such representations.

20. Denied, except denied for lack of information and belief as to plaintiff's reliance, and denied that the plaintiff reasonably could have relied on any such alleged representations.

21. Denied, except denied for lack of information and belief as to any alleged representations by and the intention of Evins and Case, but admitted that plaintiff signed the Subscription Agreement.

22. Denied, except to admit that an agreement was entered into between Medstone International, Inc. and Michael Reese Hospital and Medical Center and Michael Reese Second Century Foundation ("Michael Reese"), dated November 14, 1984, (the "Michael Reese Agreement"), and reference is made to that agreement for its terms and conditions, and admitted that plaintiff participated in negotiations which resulted in that Agreement.

23. Admitted.

24. Admitted.

25. Denied.

26. Denied, except admitted that a letter of credit was essential to the consummation of the Michael Reese Agreement and that plaintiff entered into an agreement with Dr. Gerald Wallace dated November 6, 1984 (the "Hammond-Wallace Agreement"). Plaintiff's motivation in entering into that agreement is denied for lack of information and belief.

27. Denied, except whether plaintiff viewed the Hammond-Wallace Agreement as favorable to him is denied for lack of information and belief.

28. Denied, except that Evins' alleged criticism is denied for lack of information and belief.

29. Denied, except admitted that the plaintiff, following receipt of advice from independent counsel, signed the Subscription Agreement dated November 9, 1984.

30. Denied as to plaintiff's beliefs for lack of information and belief. If the reference to plaintiff's attorneys includes this defendant, this defendant denies that he was plaintiff's attorney. Defendant refers to the Amended Subscription Agreement dated as of November 9, 1984 for the terms thereof and admits plaintiff signed that agreement.

31. Defendant answers by referring to his responses to paragraphs 1 through 30 of the complaint as set forth heretofore.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Defendant answers by referring to his responses to paragraphs 1 through 38 of the complaint as set forth heretofore.

40. Denied.

41. Denied.

42. Defendant answers by referring to his responses to paragraphs 1 through 41 of the complaint as set forth heretofore.

43. Denied for lack of information and belief.

44. Denied.

45. Denied.

46. Defendant answers by referring to his responses to paragraphs 1 through 45 of the complaint as set forth heretofore.

47. Denied.

48. Denied.

49. Defendant answers by referring to his responses to paragraphs 1 through 48 of the complaint as set forth heretofore.

50. Admitted only that plaintiff was engaged in the practice of urology in Spartanburg, South Carolina, otherwise denied for lack of information and belief.

51. Denied.

52. Denied to the extent "Defendant" refers to this defendant, otherwise, denied for lack of information and belief.

53. Denied for lack of information and belief.

54. Defendant answers by referring to his responses to paragraphs 1 through 53 of the complaint as set forth heretofore.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. All allegations of the complaint are denied except as heretofore admitted, modified or explained.

SECOND DEFENSE TO FIRST CAUSE OF ACTION

60. Plaintiff has failed to state facts sufficient to constitute a cause of action for fraud and deceit.

SECOND DEFENSE TO SECOND CAUSE OF ACTION

61. Plaintiff has failed to state facts sufficient to

constitute a cause of action against this defendant for breach of fiduciary duty.

SECOND DEFENSE TO THIRD CAUSE OF ACTION

62. Plaintiff has failed to state facts sufficient to constitute a cause of action against this defendant for legal malpractice.

SECOND DEFENSE TO FOURTH CAUSE OF ACTION

63. Plaintiff has failed to state facts sufficient to constitute a cause of action against this defendant for conspiracy.

SECOND DEFENSE TO FIFTH CAUSE OF ACTION

64. Plaintiff has failed to state facts sufficient to constitute a cause of action against this defendant for slander, libel or defamation.

SECOND DEFENSE TO SIXTH CAUSE OF ACTION

65. Plaintiff has failed to state facts sufficient to constitute a cause of action under the South Carolina Unfair Trade Practices Act. Moreover, that act is unconstitutional in that it violates the due process clause of the United States Constitution and South Carolina Constitution and further unconstitutionally delegates enforcement authority to an administrative agency.

THIRD DEFENSE TO THIRD CAUSE OF ACTION

66. If this cause of action is taken to refer to defendant Kramer, and is an attempt to allege a cause of action for legal malpractice, then this defendant would show that it was not possible for any alleged negligence or fault on his part to have

caused the plaintiff any damages in the absence of equal or greater fault on the part of the plaintiff, which combined and concurred with any alleged fault on the part of the defendants to bring about any alleged legal injury to the plaintiff..

67. The contributory negligence, recklessness, willfulness, or other degree of fault, on the part of plaintiff was:

(a) His misleading the other subscribers to the August 30, 1984 Subscription Agreement to believe plaintiff had the ability to raise the License royalty in the time provided for in the Option Agreement;

(b) His negotiating an inadequate amount of time to raise the License fee, knowing he required the resources of others;

(c) His pursuit of ineffectual activities to raise the License royalty;

(d) His entering into the Hammond-Wallace Agreement in direct violation of the instructions of his attorneys Ervin and Case and in direct violation of various terms and conditions of the agreements entered into with the California Group;

(e) His arranging under the Hammond-Wallace agreement for the profitable sale of his subscription interests in Medstone to Wallace, without offering this arrangement to, or providing a similar arrangement for, other Medstone subscribers, at a

time when he was president and a director of Medstone;

(f) His failure to pursue the guarantee of the letter of credit for Michael Reese with persons in Spartanburg, South Carolina and its environs; and,

(g) His failure to provide Gerald Wallace with a guarantee which Wallace required to protect him against loss under the letter of credit.

Without this fault on the part of plaintiff, no loss or injury would have occurred and this contributory negligence, recklessness, willfulness, or other degree of fault is pled as an absolute bar to any recovery by the plaintiff herein.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

68. The facts alleged pursuant to causes of action First through Sixth fail to state any other causes of action against defendant recognized in law or in equity.

FURTHER DEFENDANT TO ALL CAUSES OF ACTION

69. Any damage suffered by plaintiff arose out of his willful and reckless conduct as more fully set forth in paragraph 67.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

70. To the extent that plaintiff attempts to allege an injury or damages from the expiration of the option agreement on November 8, 1984, he has failed to state facts sufficient to constitute a cause of action against the defendants because, at the time the option expired, it was owned by Hammond

to pursue these claims.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

71. In that the plaintiff, with prior knowledge of all relevant facts, executed written documents which fixed his stock ownership in Hammond Technologies, Inc. which became Medstone International, Inc., and then worked as an officer and director of Medstone from November 1984 until July 1985, he is bound by those agreements and he has waived, and is estopped to assert, any cause of action for alleged losses arising out of the agreements among the parties.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

72. The plaintiff is barred by laches from pursuing the causes of action stated in his complaint.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

73. This Court lacks personal jurisdiction over this defendant, and the exercise of jurisdiction will violate the due process clause of the Fourteenth Amendment to the United States Constitution.

FURTHER DEFENSE TO ALL CAUSES OF ACTION

74. The plaintiff executed an Arbitration Agreement subjecting the claims asserted to arbitration in New York City in accordance with the Rules of the American Arbitration Association.

75. The arbitration agreement is pled as an absolute bar to the plaintiff pursuing any claim under this complaint other than by arbitration in New York City.

that the complaint of the plaintiff be dismissed with costs.

J. D. Todd, Jr.
C. Doyle Martin

By: _____

LEATHERWOOD WALKER TODD & MANN, P. C.
100 East Coffee Street
P. O. Box 87
Greenville, South Carolina 29602
(803) 242-6440

ATTORNEYS FOR DEFENDANT ALAN S. KRAMER

Greenville, S. C.

August 9, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between	:	90 Civ. 5226 (KTD)
ALAN S. KRAMER,	:	**ANSWER TO PETITION TO COMPEL ARBITRATION**
Petitioner,	:	
and	:	
GAINES W. HAMMOND,	:	
Respondent.	:	

Respondent Gaines W. Hammond, by his attorneys, Kornstein Veisz & Wexler, respectfully answers the Petition herein as follows:

1. Respondent admits upon information and belief the allegations of Paragraph 1.

2. Respondent admits the allegations of Paragraph 2.

3. Respondent admits that the Petition purports to seek relief under the Federal Arbitration Act, as alleged in Paragraph 3.

4. Respondent admits upon information and belief that petitioner and respondent are of diverse citizenship and that the matter in controversy exceeds the sum of $50,000 exclusive of interest and costs.

5. Respondent denies the allegations of Paragraph 5, except admits that, if the disputes at issue in the South Carolina and New York Actions are found to be subject to a valid,

enforceable agreement to arbitrate that petitioner has not waived, which respondent denies, then this Court would have personal jurisdiction over respondent and venue in this District would be proper.

6. Respondent denies the allegations of Paragraph 6, except admits that, if the disputes at issue in the South Carolina and New York Actions are found to be subject to a valid, enforceable agreement to arbitrate that petitioner has not waived, then the transactions at issue would involve commerce between the states.

7. Respondent denies the allegations of Paragraph 7 and respectfully refers the Court to the option, license and sublicense agreements, which are annexed to the complaint filed by respondent in the South Carolina Action in March 1986 (Exhibit A hereto), for the terms thereof. The facts concerning the dispute between the parties are found in that complaint, to which respondent respectfully refers the Court.

8. Respondent denies the allegations of Paragraph 8.

9. Respondent denies the allegations of Paragraph 9.

10. Respondent denies the allegations of Paragraph 10.

11. Respondent denies the allegations of Paragraph 11.

12. Respondent admits only that in March 1986 he commenced an action in South Carolina against his former attorneys, one of whom was petitioner. As to the remaining allegations of Paragraph 12, which purport to summarize the complaint in the South Carolina Action, respondent respectfully

refers the Court to that complaint, which is annexed hereto as Exhibit A.

13. Respondent admits that after the filing of the South Carolina Action, petitioner filed a motion to dismiss that action for lack of personal jurisdiction. Respondent additionally alleges that petitioner's jurisdictional motion failed to assert any defense or objection that the disputes alleged in the complaint were subject to arbitration.

14. Respondent admits the allegations of Paragraph 14.

15. Respondent admits the allegations of Paragraph 15. Respondent additionally alleges that petitioner's answer in the New York Action failed to assert any defense or objection that the disputes alleged in that complaint were subject to arbitration.

16. Respondent admits the allegations of Paragraph 16.

17. Respondent admits the allegations of Paragraph 17.

18. Respondent denies the allegations of Paragraph 18.

19. Respondent admits the allegations of Paragraph 19.

20. Respondent denies the allegations of Paragraph 20.

21. Respondent admits upon information and belief the allegations of Paragraph 21.

FIRST AFFIRMATIVE DEFENSE

22. The Petition fails to state a claim for relief under the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

SECOND AFFIRMATIVE DEFENSE

23. There exists no valid, enforceable arbitration agreement between the parties concerning the disputes at issue in the South Carolina and New York Actions.

THIRD AFFIRMATIVE DEFENSE

24. Even if there were a valid, enforceable arbitration agreement, Petitioner, by virtue of his conduct, has waived any right to arbitrate the disputes at issue in the South Carolina and New York Actions.

FOURTH AFFIRMATIVE DEFENSE

25. Even if there were a valid, enforceable arbitration agreement and petitioner had not waived his right to arbitration, the disputes at issue in the South Carolina and New York Actions are not within the scope of the alleged arbitration agreement.

FIFTH AFFIRMATIVE DEFENSE

26. Petitioner, by virtue of his conduct, is estopped to assert that the disputes in the South Carolina and New York Actions are subject to arbitration.

SIXTH AFFIRMATIVE DEFENSE

27. Petitioner is barred from seeking any equitable relief compelling arbitration by virtue of the doctrine of laches.

WHEREFORE, respondent respectfully requests that this Court:

(i) deny petitioner's request for an order compelling respondent to arbitrate the disputes in the South Carolina and New York Actions pursuant to 9 U.S.C. § 4;

(ii) deny petitioner any other equitable or legal relief under the Federal Arbitration Act or otherwise;

(iii) dismiss this action in its entirety with prejudice; and

(iv) award respondent the costs and disbursements of defending this action, including reasonable attorneys' fees, and such other and further relief as the Court may deem appropriate.

Dated: September 10, 1990
New York, New York

KORNSTEIN VEISZ & WEXLER

By: Richard F. Lubarsky
Richard F. Lubarsky (RL-4456)
757 Third Avenue
New York, New York 10017
(212) 418-8600

Attorneys for Respondent
Gaines W. Hammond

LEWIS, BABCOCK,
PLEICONES & HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Of Counsel

Exhibit A

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

GAINES W. HAMMOND, JR.,)
)
Plaintiff,)
)
vs.)
)
BUTLER, MEANS, EVINS AND)
BROWNE, THOMAS A. EVINS,)
STANLEY T. CASE, AND)
ALAN S. KRAMER,)
)
Defendants.)

COMPLAINT
(JURY DEMANDED)

The Plaintiff, complaining of the Defendants above named, would respectfully show unto the Court:

GENERAL

1. The Plaintiff is a resident of Spartanburg, South Carolina engaged in the practice of urology.

2. Upon information and belief, the Defendant, Butler, Means, Evins and Browne, is a partnership of Thomas A. Evins, T. Sam Means, Jr., R. E. Browne, III, Elford H. Morgan, Thomas A. Phillips, Edward R. Cole, Amos A. Workman, Stanley T. Case, Roger M. Bradford, and T. Alexander Evins, (hereinafter referred to as Butler Means) established under the laws of South Carolina for the purpose of practicing law in the State of South Carolina. The Defendant, Butler Means, holds itself out as a partnership in Spartanburg, South Carolina and, upon information and belief, was at all times complained of performing legal services in South Carolina. The Defendants, Thomas A. Evins and Stanley T. Case, upon information and belief, are members and partners in the Defendant Law Firm of Butler Means, and at all times complained of were acting as partners and agents of said Law Firm. Upon information and belief, the Defendants, Evins and Case, were the individual attorneys assigned the

responsibility for handling the Plaintiff's legal affairs, the details for which are set out more fully below.

3. Mr. Alan S. Kramer is an attorney licensed and living in the State of New York. Mr. Kramer was an agent for HTI now Medstone International, Inc., which at some of the times complained of had its principal place of business in South Carolina. Mr. Kramer entered into contracts to be performed in whole or in part in South Carolina. Mr. Kramer had numerous contacts with South Carolina in particular but not limited to contacts with Mr. Case and Mr. Evins. Upon information and belief, Mr. Kramer in concert with Mr. Case and/or Mr. Evins entered into a conspiracy and an agreement to fool, cheat and manipulate the Plaintiff so as to greatly dilute and/or take away Plaintiff's rights and/or interest in what is now known as Medstone International Inc. The conspiracy resulted in the Plaintiff's attorneys and their co-counsel ending up with 18,000 shares in the company Plaintiff started and hired them to organize. Due to the conspiracy, the Plaintiff, while starting with 70,000 shares, ended-up with only 10,000 shares.

4. In August of 1984, the Plaintiff engaged the services of the Defendants, Evins and Case, to assist him and represent him with respect to his plans to enter into an Option Agreement for the purchase of licensing rights for the non-invasive lithrotripting of kidney stones, and the formation of a corporation to ultimately own these licensing rights and engage in the marketing of the technology.

5. In September of 1984, the Plaintiff entered in to an Option Agreement with the inventors of the technology described above. Among these inventors were Errol Payne, Dr. Richard Penfil, and Charles McGregor, hereinafter referred to collectively as "The California Group", whereby in exchange for the purchase price of $50,000.00, the Plaintiff was granted an option to purchase the license to the technology described above.

6. By the terms of the Option Agreement, the Option was scheduled to

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expire on October 22, 1984, later extended to November 8, 1984 upon the receipt by The California Group of the sum of $25,000.00.

7. The Option Agreement required the Plaintiff to meet certain obligations as a condition to the exercise of this Option, specifically the payment of $1,200.00.

8. Section 1.5 of the Option Agreement, which is attached hereto as Exhibit "A" and incorporated herein provides:

> A condition to Optionees exercise of this Option shall be:
>
> (a) Optionee obtaining the written consent of investors to a plan to capitalize the enterprise which is to be the Licensee under the license agreement, investors agreeing that they will consent to any plan of capitalization which provides for such enterprise to have, a net worth (excluding the value of the license agreement) of not less than $2,000,000.00 within six months from the commencement date (as hereinafter defined) but not less than $4,000,000.00 within one year from such date;
>
> (b) Optionees consent to an agreement proposed by investors for the limited market rights or devices incorporated in the the invention, Gary P. Klisham or an entity designed by him and acceptable to the inventors, such rights to be granted by Licensee under the license agreement; and
>
> (c) The Licensee under the license agreement entering into an sublicense agreement in the form annexed hereto as Exhibit "B". The inventors may in their sole discretion waive any of the conditions contained in this Section 1.5.

9. Prior to August 30, 1984, the Plaintiff and The California Group met in California and entered into negotiations to form a corporation to market the technology which the Plaintiff intended to purchase through the exercise of the Option.

10. The Plaintiff was represented in these negotiations by Defendants, Evins and Case. The California Group was represented by Defendant, Alan S. Kramer.

11. As a result of these negotiations, the Plaintiff and The California Group entered into an oral agreement (Subscription Agreement #1) whereby a corporation to be known as Hammond Technologies, Inc. (HTI) would be formed, with shares to be subscribed as follows:

The Plaintiff had subscription rights to 70 points or 70,000 shares, and The California Group had rights to 25 points or 25,000 shares, and 5 points or 5,000 shares were assigned to one Gary Klischam. The Plaintiff being entitled to this substantial portion of the corporation in exchange for raising capital to acquire the licensing rights for the benefit of HTI.

12. In the course of committing this oral agreement to writing, the Defendants, Evins, Case and Kramer, entered into an agreement of their own and prepared a Subscription Agreement which provided for a greatly different division of ownership than the one The California Group and the Plaintiff had entered into upon oral agreement in California.

13. Specifically, the Plaintiff's subscription was reduced to 35 points or 35,000 shares. The Defendants, Evins and Case, as agents for their law firm, took 6½ points or 6,500 shares and Kramer also took 6½ points or 6,500 shares. The California Groups subscription remained at 25 points or 25,000 shares.

14. Upon presentation of this new Subscription Agreement (Subscription Agreement #2) to the Plaintiff, Defendant Evins represented to the Plaintiff that The California Group insisted upon this allocation of a total of 13 point to the parties various attorneys and the the deal would not be accepted by The California Group unless the Plaintiff signed this new Agreement.

15. Defendant Evins represented that the Plaintiff would still have majority control under the new scheme, Defendant Evins represented to Plaintiff that 22 points or 22,000 shares had been set aside; 15 for capitalization of HTI and 7 for future management, over which the Plaintiff had voting control. The Defendants Evins and Case also assured the Plaintiff that the 6½ points or 6,500 shares, allotted to them, would always be voted with the Plaintiff's shares. Defendant Evins further represented to Plaintiff that this arrangement was for his benefit and did not require immediate payment.

16. These representations lead the Plaintiff to believe that he controlled 63½ points or 63,500 shares of the corporation.

17. In reliance upon the representations of Defendant, Evins, the Plaintiff signed Subscription Agreement #2, a copy of which is attached hereto as Exhibit "B" and the terms of which are incorporated herein.

18. Subsequently, the Plaintiff discovered that he did not in fact control a majority of the corporation and that under the terms of Subscription Agreement #2, which his own attorneys drafted, the 22 points were not controlled by him and the 15 points required a 80% vote and the 7 points required a 80% vote. The Plaintiff having actual control of only 35 points or 35,000 shares, could not even acquire the control which his attorneys had assured him he had.

19. Said representations were false and material to Plaintiff's decision to sign Subscription Agreement #2, which decreased his ownership and control by fifty (50%) percent.

20. The Plaintiff did in fact rely solely upon said representations in so signing such Agreement.

21. Said representations were made with the intention of inducing the Plaintiff to sign the Agreement. The Plaintiff did in fact sign the Agreement, and as a consequence and proximate result of the Defendants' actions, the Plaintiff suffered substantial damages, including loss of 35,000 shares of HTI, loss of control of HTI and its Board of Directors and a loss of 35% of the earnings of HTI.

22. In an effort to comply with the terms of his Option Agreement, the Plaintiff negotiated an Agreement with HTI and Michael Reese Hospital (MR), in Chicago, Illinois whereby MR would purchase the licensing rights to use one (1) of the lithrotriptor machines for the price of $1,200,000.00 and thereby permit Plaintiff to raise the capital required by his Option Agreement to purchase the licensing of the technology.

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23. In accordance with the terms of the Option, Plaintiff assigned his rights thereunder to HTI. With the October 22 Option deadline fastly approaching, the Plaintiff purchased an extension of the Option until 5:00 o'clock p.m. eastern-standard time, November 8, 1984 for $25,000.00.

24. The MR Agreement required, among other things, a $400,000.00 irrevocable letter of credit in favor of MR against which drafts could be made in certain specified circumstances.

25. Because of assurances given by the Defendants and upon information and belief as part of Defendants' plans, the Plaintiff's deadline to exercise the said Option was allowed to approach without a firm understanding as to raising the necessary capital.

26. As the $400,000.00 letter of credit was essential to consumation of the sale to MR, and thus essential to Plaintiff's exercise of his Option, the Plaintiff entered into an Agreement, dated November 6, 1984 with one Dr. Gerald Wallace. This Agreement will hereinafter be referred to as the Wallace Agreement, a copy of which is attached hereto as Exhibit "C" and the terms of which are incorporated herein.

27. The Wallace Agreement provided for the essential letter of credit, and was otherwise favorable to the Plaintiff as well as the California Group. Furthermore, it would have allowed Plaintiff to comply with the terms of his Option Agreement, provide HTI with the licensing rights to the technology and maintain Plaintiff's control over 35% of HTI.

28. To the detriment of the Plaintiff, Defendants, Evins and Case, refused to defend or even negotiate with the Wallace Agreement. Without reading one (1) word of the Wallace Agreement, Defendant, Evins criticized it, as well as the Plaintiff, and then began, with the assistance of Defendants, Case and Kramer, to intentionally prevent the Plaintiff from being able to maintain his ownership percentage

in HTI by allowing the November 8 deadline to pass and by representing to the Plaintiff that his Option has expired and he was "out of HTI".

29. By failing to act on Plaintiff's behalf, and making the above representations, the Defendants conspiring induced the Plaintiff to sign still another Subscription Agreement, (Subscription Agreement #3) the date of this Agreement being November 9, 1984. A copy of this Agreement is attached hereto as Exhibit "D".

30. The Plaintiff, relying on the representations of his attorneys, believed that his Option had in fact expired and the he no longer had any ownership rights in HTI. Based upon this belief, the Plaintiff signed the Subscription Agreement #3, whereby he was designated only 10 points or 10,000 shares in the corporation. Dr. Wallace, in exchange for the use of his letter of credit, was given 10 points or 10,000 shares as well. The Defendant, Evins, as agent for Butler Means, received 7½ points or 7,500 shares, a one (1) point gain from the last Subscription Agreement. Defendant, Kramer was also designated a greater portion, this time his share being 10½ points or 10,500 shares. The California Group was designated 35 points or 35,000 shares under this Agreement.

FOR A FIRST CAUSE OF ACTION

31. The Plaintiff reiterates the allegations contained in paragraphs 1 through 30 above as fully as if repeated herein verbatim.

32. Defendants made the following false representations to Plaintiff:

i The California group insisted on Agreement #2, particularly the allocation of 13,000 shares and would not go forward with the project unless Plaintiff signed that Agreement;

ii Under Subscription Agreement #2, Plaintiff would control a 63,500 share majority of HTI;

iii The 6,500 shares alloted to them would always be voted with Plaintiff's shares;

iv The terms of Subscription Agreement #2 were beneficial to Plaintiff; and

v The option had expired and Plaintiff was "out of HTI".

33. Defendants had knowledge of their falsity at the time said representations were made to Plaintiff.

34. The representations were each material to Plaintiff's decision to sign Subscription Agreement #2 and Subscription Agreement #3.

35. The representations were made with the clear intention of inducing Plaintiff to sign said Agreements.

36. Plaintiff was ignorant of the falsity of the representations and relied on their truth in his decision to sign said Agreements.

37. Plaintiff had a right to rely on the representations.

38. Plaintiff has been damaged as a direct and proximate result of Defendants' misrepresentations and is informed and believes that he is entitled to actual damages in excess of $6,500,000.00, and punitive damages in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION

39. The Plaintiff herein reiterates the allegations contained in paragraphs 1 through 38 above as fully as if repeated herein verbatim.

40. Defendants as fiduciaries of Plaintiff, breached their duty to Plaintiff by:

i Fradulently inducing him to enter into Subscription Agreement #2, by way of false representations as set out in Paragraph 30 above and thereby decreasing Plaintiff's ownership from 70,000 shares to 35,000 shares;

ii Failing to represent and protect Plaintiff's interests in the negotiation process with the California Group and its lawyer, Defendant, Kramer;

iii Failing to negotiate for an extention of time of time for Plaintiff to fulfill the terms of the Option;

iv Failing to act on Plaintiff's behalf during the critical periods and prior to expiration of the Option;

v Failing to defend the Wallace Agreement which allowed

Plaintiff to fulfill his obligation and maintain control of his 35,000 shares of HTI;

vi Criticizing Plaintiff in the presence of his associates;

vii Representing to Plaintiff that his Option had expired and he was "out of HTI" and that unless he so agreed, inducing his to agree to give up an additional 25,000 shares of HTI by signing Subscription Agreement #3, and placing their interests above the interests of the Plaintiff, their client; and

viii Breaching the professional confidences of Plaintiff.

ix Puting their interest ahead of their client's interest.

41. As a consequence and proximate result of Defendants breaches of fiduciary duty to Plaintiff, Plaintiff has suffered actual damages in an amount in excess of $6,500,000.00 and punitive damages as may be determined at trial.

FOR A THIRD CAUSE OF ACTION

42. Plaintiff herein reiterates the allegations in paragraphs 1 through 41 above as fully as if repeated herein verbatim.

43. Defendants. Evins and Case, as Plaintiff's attorneys and counselors, owed a duty to Plaintiff to exercise reasonable care in advising Plaintiff to enter into Subscription Agreement #2 and #3, in drafting said Agreements, and in protecting Plaintiff's ownership and control of HTI and legal interests therein generally.

44. As planned with Defendant Kramer, Defendants Evins and Case negligently, wilfully and wantonly failed to carry out their duty to exercise reasonable care in their representation and counseling of Plaintiff with regard to the Agreements and in protecting Plaintiff's control of HTI and in fact put their own interest ahead of their client's interest.

45. As a consequence and proximate result of Defendants' negligence, gross negligence and wilfulness, Plaintiff has suffered actual damages in an amount in excess of $6,500,000.00 and punitive damages in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION

46. Plaintiff herein reiterates the allegations of paragraphs 1 through 45 above as fully as if repeated herein verbatim.

47. Defendants knowingly, and in combination by consented actions and with intent to injure Plaintiff, conspired among themselves to defraud, trick and manipulate the Plaintiff to deprive him of 60,000 shares of HTI and his majority control of HTI and to gain ownership of 13,000 shares for themselves. They did this by inter alia:

i Inducing Plaintiff by way of false representation to sign Subscription Agreement #2 which reduced Plaintiff's ownership from 70,000 shares to 35,000 shares and increased Defendants' ownership from 0 to 13,000 shares;

ii Inducing Plaintiff by way of false representations to sign Agreement #3 which further reduced Plaintiff's ownership from 35,000 shares to 10,000 shares and increased Defendants' ownership from 13,000 to 18,000 shares; and

iii Preventing Plaintiff from exercising his rights under the Option Agreement; and

iv By keeping Plaintiff from his lawful right to 70,000 shares;

48. As a consequence and proximate result of Defendants' acts of conspiracy, Plaintiff has suffered actual damages in an amount in excess of $6,500,000.00 and punitive damages in an amount to be determined at trial.

FOR A FIFTH CAUSE OF ACTION

49. Plaintiff herein reiterates the allegations contained in paragraphs 1 through 48 above as fully as if repeated herein verbatim.

50. At all times herein mentioned, Plaintiff was engaged in the practice of urology in the City of Spartanburg, and was largely dependant thereon for his livelihood and was, for the successful practice of his profession, largely dependant upon his good legal name and reputation for responsibility, honesty and integrity.

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51. In November 1984, Defendants, through Mr. Evins, maliciously published the following statements:

> i Gaines Hammond is a crazy, irrational and hysterical man;
>
> ii Gaines Hammond has committed fraud and acted in bad faith;
>
> iii Gaines Hammond is not capable of running HTI or handling any business matters at all;
>
> iv Gaines Hammond is irresponsible, dishonest, untrustworthy and he has done me (Defendant Evins) in; and
>
> v Gaines Hammond cannot handle pressure.

Each of the above statements was false and was meant to convey, and did convey to the persons to whom and among whom Defendant, Evins, published the same, the meaning that Plaintiff had not acted in good faith as a Shareholder of HTI, had acted irresponsibly, recklessly, unprofessionally and with the intent of running the corporation.

52. Defendant published the matters set forth above slandering Plaintiff for the purpose of exposing Plaintiff to contempt, hatred and redicule of those to whom and among whom the slanderous statements were published.

53. As a direct and proximate result of Defendant, Evins' publication of the false and defamatory matters Plaintiff has been injured in his reputation and practice of urology, and has suffered actual damages in in amount in excess of $6,000,000 and punitive damages in an amount to be determined at trial.

FOR A SIXTH CAUSE OF ACTION

54. Plaintiff herein reiterates the allegations contained in paragraphs 1 through 53 above as fully as if repeated herein verbatim.

55. The Defendants come within the prohabitions of the South Carolina

Unfair Trade Practices Act.

56. The acts as set out above individually and/or together are deceptive and unfair trade practices amounting to a violation of said Act.

57. Said actions were wilful, damaging Plaintiff in the amount of $6,500,000.00.

58. Because said acts were wilful, the Plaintiff is entitled to treble damages and attorneys' fees.

WHEREFORE, Plaintiff prays for judgment against the Defendants for actual damages of $6,500,000.00, for punitive damages, treble damages, attorneys' fees and costs as allowed.

LEWIS, BABCOCK, GREGORY & PLEICONES
A. Camden Lewis
Mary G. Foster

BY: _____
1529 Laurel Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000
Attorneys for the Plaintiff

Columbia, South Carolina

This the 12 day of March, 1986

OPTION FOR LICENSE AGR NT

Agreement made this _____ day of September 1984 between Errol Payne ("Payne"), Richard Penfil ("Penfil") and Charles McGregor ("McGregor"), collectively the "Inventors" and Gaines W. Hammond on the other part ("Optionee").

WHEREAS, Inventors have developed a system of improvements for the non-invasive lithotripting of certain kidney stones as more fully described on Exhibit A and hereinafter referred to as the "Invention"; and

WHEREAS, Optionee desires to obtain an option allowing Optionee to determine whether to enter into a license for its use.

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I

OPTION GRANT AND CONSIDERATION

1.1. For the sum of $50,000 paid by Optionee to Inventors, receipt of which is hereby acknowledged, Inventors hereby grant Optionee an option to enter into the license agreement annexed as Exhibit B ("License Agreement"). The option shall extend from the date hereof until 5:00 p.m. pacific coast time on October 22, 1984 or such extended date as is determined in accordance with section 1.7 hereof.

1.2. Optionee shall have the right to extend this option to enter into the License Agreement until 5:00 p.m. pacific coast time on November 8, 1984 or such extended date as is determined

EXHIBIT A

B 001108

in accordance with section 1.7, upon payment to Inventors of $25,000 prior to the end of the period provided for in section 1.1.

1.3. Commencing September 24, 1984 and through the option period identified in section 1.1, Inventors shall make available to Optionee a prototype of the invention ("Prototype"), with the capability to lithotript simulations of kidney stones in phantoms simulating human beings (the "Capability"), such Prototype and Capability being more fully described in Exhibit C hereto. Commencing October 1, 1984 and through the option period identified in section 1.1, Inventors shall make the Prototype available to persons designated by Optionee, and conduct such use thereof as Optionee shall reasonably require to demonstrate the Capability. The purpose of such demonstrations shall be to obtain funding for the enterprise intending to exercise the option. Inventors shall have the right not to demonstrate or otherwise give access to the Prototype to any person or entity who they reasonably believe is not interested in providing such funding but primarily is interested in obtaining access to the Prototype for competitive or other purposes. In the event this option is extended as provided for in section 1.2, the access and demonstrations provided for in this section shall continue through the end of the extended option period provided for in section 1.2. The Prototype shall be made available at such site within the continental United States as Inventors may reasonably determine.

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1.4 During the period of the option, Inventors shall make available to Optionee all information regarding the Invention that Optionee reasonably requires to evaluate the Invention and which is in the possession of Inventors; provided Inventors shall have no obligation to make available confidential proprietary information of Inventors which is not reasonably required to evaluate the Invention and if required no such information need be provided until Optionee has entered into a confidential non-disclosure agreement with Inventors reasonably acceptable to Inventors in the exercise of their reasonable judgmen

1.5. A condition to Optionee's exercise of this option shall be:

(a) Optionee obtaining the written consent of Inventors to a plan to capitalize the enterprise which is to be the licensee under the License Agreement, Inventors agreeing that they will consent to any plan of capitalization which provides for such enterprise to have, a net worth (excluding the value of the License Agreement) of not less than $2,000,000 within six months from the Commencement Date (as hereinafter defined) and not less than $4,000,000 within one year from such date;

(b) Optionee's consent to an agreement proposed by Inventors for the limited marketing rights for devices incorporating the Invention, of Gary P. Clish or an entity designed by him and acceptable to

B 001119

(c) Licensee under the License Agreement* entering into a Sublicense Agreement in the form annexed hereto as Exhibit D.

Inventors may in their sole discretion waive any of the conditions contained in this Section 1.5.

1.6. The option shall be exercised by delivery to Inventors of two copies of the License Agreement duly executed by Optionee or a corporation meeting the requirements of section 1.8.

1.7. All payments for the option shall be made in cash or by unendorsed certified check drawn on a bank which is a member of the Federal Reserve System and made payable to and delivered to Payne. No portion of the payments made by Optionee to Inventors to obtain or extend this option shall under any circumstances be refundable or othewise due by Inventors to Optionee unless Inventors have not made the Prototype with the Capability available to Optionee by October 1, 1984 or extended the option period for one day for each day by which they are delinquent in providing such availability and upon failure of Inventors to provide such availability or to extend the option and in any event if such availability is not provided by October 9, 1984, Optionee may cancel this option and shall receive from Inventors a return of the full option price paid to Inventors. Without limiting the foregoing, the inability to obtain patent protection for the Invention, its infringement of the patent or other proprietary rights of others, its failure to comply with applicable laws or regulations or to be safe, or, except as provide in the preceding sentence, its lack of efficaciousness, shall give Optionee no right to return of any sum paid hereunder.

of the exercise of the option.

ARTICLE 11

GENERAL PROVISIONS

2.1. This option shall inure to the benefit of and be binding upon the legal representatives of the parties. Except as provided in Section 1.8, neither party may assign its rights or duties under this Agreement without the prior written consent of the other party.

2.2. Any notice, other communication or document to be delivered under this option shall be in writing duly executed by the party giving it and shall be deemed given only when actually delivered to the other party or three days after being deposited in the U.S.A. mail, registered or certified mail return receipt requested, postage prepaid, and addressed as follows:

(a) If to Inventors:

Errol Payne
c/o Design West
2532 Dupont Drive
Irvine, California 92715

(b) If to Optionee:

c/o Thomas A. Evins, Esq.
Butler, Means, Evins & Browne
Lawyers Building
208 Magnolia Street
Spartanburg, South Carolina 29304

or to such other address or addressee as a party may designate by written notice given in accordance with this provision.

any subsequent default under the same provision or a waiver of default under any other provision of this Agreement.

2.4. Each right, power and remedy provided herein or now or hereafter existing at law, in equity, by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for herein or now or hereafter existing at law, in equity by statute or otherwise, and the exercise or beginning of exercise or forebearance of exercise by any party of any one or more of such rights, powers or remedies, shall not be deemed a waiver by such party of any or all such other rights.

2.5. This Agreement constitutes the entire agreement of the parties with respect to the subject matter of this Agreement and supersedes any prior agreement between them whether written or oral and cannot be altered, modified or discharged orally but only by an agreement in writing signed by each of the parties hereto, or their heirs or legal representatives.

2.6. This Agreement may be executed in multiple original counterparts, each of which shall for all purposes be deemed original and all of such counterparts shall together constitute but one and the same Agreement.

2.7. This Agreement shall be interpreted under and construed in accordance with the law of the State of California.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the date first set forth above.

Gaines W. Hammond

Ethel Payne

Richard Penfil

Charles McGregor

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SUBSCRIPTION AGREEMENT

This Subscription Agreement is made as of August 30, 1984.

1. The undersigned hereby agree to form a Delaware Corporation for which the name Hammond Technology, Inc. ("Newco") shall be sought, and to subscribe to the number of shares of its common stock set forth below at $1.00 per share. Payment for the shares shall be made within 60 days from the date hereof and no shares shall be issued to an undersigned until he has paid for his shares in full. Newco shall be formed to commercialize rights to technologies for the non-invasive treatment of kidney stone and similar ailments.

NAME AND ADDRESS OF SUBSCRIBER	NUMBER OF SHARES
(a) Gaines W. Hammond Jr., M.D. 145 Dillon Drive Spartanburg, South Carolina 29302	35,000
(b) Errol Payne c/o Design West 2532 Dupont Drive Irvine, California 92715	10,000
(c) Richard Penfil M.D. P.O. Box 5660 Balbou Island, California 92662	10,000
(d) Charles McGregor c/o Design West 2532 Dupont Drive Irvine, California 92715	5,000
(e) Thomas A. Evins, Esq. as agent for Butler,Means,Evins & Browne 205 Magnolia Street Spartanburg, South Carolina 29304	6,500

B 000153

EXHIBIT B

11 East 44th Street
New York, New York 10017

(g) Gary P. Clisham*

(h) David Blunt*

(i) Tom Gardner*

2. The undersigned hereby reserve from the authorized but unissued common stock of Newco the following shares for the following purposes, such reservation to continue until holders of not less than 85% of the shares of Newco's capital stock outstanding, vote or consent to terminate such reservation:

(a) 15,000 common shares for a private placement to raise $5,000,000 in gross proceeds; and,

(b) 7,000 shares to underlie an Incentive Stock Option Plan meeting the requirements of the Internal Revenue Code, to be adopted by Newco.

3. Newco's capital shall consist solely of common shares of which 1,000,000 shares, par value 10¢ each, shall be authorized. The shares subscribed by Errol Payne, Richard Penfil and Charles McGregor (hereinafter, "Put Holders"), shall in the aggregate represent not less than 25% of the oustanding shares of Newco (a)

*In the aggregate 5000 shares to be allocated by Clisham; addresses to be furnished.

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until it has a ~e worth, determined in a[illegible]ance with the definition contained in paragraph 7 (d) hereof, of not less than $4,000,000 and (b) until its common stock is traded on an exchange registered with the Securities and Exchange Commission ("SEC") or on the NASDAQ or any successor system. Accordingly, until both such conditions are met, no shares of Newco's capital stock shall be issued beyond those subscribed hereunder, outright or on exercise of options or on conversion of convertible securities, unless simultaneously, sufficient additional shares are issued without additional cost to the owners of the shares issued to Put Holders hereunder in order to maintain their percentage of total capital shares at 25%. The requirement of condition (b) shall be deemed met if the required trading commences within five business days of the issuance of additional shares. The terms of this anti-dilution provision, shall be included in the certificate of incorporation of Newco.

4. In the event that within two years from the Commencement Date, as defined in paragraph 15, Newco has not consummated a sale of its common stock to the public through a registration statement declared effective by the SEC for gross proceeds of not less than $5,000,000, or entered into a business combination or sold substantially all its assets to a company whose securities are listed for trading on a stock exchange registered with the SEC or traded through the NASDAQ or any successor system, then the holders ("Holders") of the securities subscribed by Put Holders or any securities of Newco received by virtue of the ownership of such securities ("Option Securities") shall have the right at anytime until the results of operations for Newco for the two full fiscal

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years of Newco completed after such two year period following the Commencement Date are delivered to Holders, to put their Option Securities to Newco for cash consideration equal to the Formula Price. The Formula Price shall be the greater of (a) two times the average gross receipts of Newco in the two fiscal years of Newco prior to exercise of the put, in which Newco had the highest gross receipts, or (b) Newco's net worth, in each case multiplied by the ratio of the Option Securities put to Newco's outstanding capital stock with the result reduced by twenty percent of the costs to Newco of litigation paid or accrued as of the date Holder exercises his put multiplied by the ratio of the Option Securities put to Newco's outstanding capital stock. Gross receipts and net worth shall be determined in accordance with generally accepted accounting principles; provided however gross receipts shall exclude any sum received from a transaction in which Newco's receipts are equal to or less than its costs of the transaction and with regard to any transaction entered into with Gary P. Clisham or an entity designated by Clisham and acceptable to Put Holders, gross receipts shall include only the difference between the total receipts of Newco less its direct costs relating thereto.

5. Newco agrees that it shall apply for key man insura in the amount of $2,000,000 naming Newco as the beneficiary in the event of the death of Hammond. Hammond agrees to cooperate in applying for such insurance. Newco shall also seek officers and directors insurance in the amount of $2,000,000. The insuran provided for in this paragraph shall not be discontinued except upon the vote or consent of the holders of 85% or more of the

shares of Newco's capital stock outstanding.

6. Hammond, Payne and Penfil agree to be directors of Newco; provided however Payne and Penfil shall not be obligated to commence being directors until Newco has obtained officers and directors insurance and shall not be obligated to continue as directors for a period of more than one year beyond the term they commence serving as directors.

7. (a) After Newco's net worth, determined in accordance with generally accepted accounting principles, exceeds $5,000,000, of which not less than $1,000,000 has been provided from retained earnings, any net worth in excess of such $5,000,000 which is composed of retained earnings and which does not reduce the retained earnings portion of net worth below $1,000,000, shall be distributed periodically to shareholders, not less frequently then semi-annually unless the holders of shares representing not less than 85% of the shares of Newco's capital stock outstanding, vote or consent otherwise. (b) Newco's expenses in any fiscal year shall not exeed the percentage of its gross receipts, as reflected below, nor shall its capital expenditures, except for the purpose of creating inventory for sale to customers, exceed 5% of its gross receipts until gross receipts exceed $10,000,000 or when gross receipts exceed $10,000,00 be greater than the larger of $500,000 or 3% of such gross receipts in any of its fiscal years, in each case unless the holders of not less than 85% of the shares of its capital stock outstanding, vote or consent otherwise. (c) Retained earnings, capital expenditures and inventory shall each be determined in accordance

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shall have the meaning assigned in paragraph 4 hereof. (d) Net worth shall be determined in accordance with generally accepted accounting principles except there shall be excluded therefrom the unamortized portion of any rights in, or to the use of, United States or foreign patents or other proprietary rights in the form of intelectual property. (e) Expenses shall be determined in accordance with generally accepted accounting principles except no extraordinary expenses shall be included. Extraordinary Expenses shall mean expenses for the public or private placement of Newco's securities, the expenses of litigation and other non-operating expenses which are not contemplated to be incurred on a regular basis.

	Percentage of Gross Receipts Authorized for Expenses
Fiscal year in which Newco has sold or otherwise placed in service five or fewer devices for the non-invasive treatment of kidney stone or similar ailments.	80%
Fiscal year in which Newco has sold or otherwise placed in service six devices for the non-invasive treatment of kidney stone or similar ailments.	75%
Fiscal year in which Newco has sold or otherwise placed in service seven devices for the non-invasive treatment of kidney stone or similiar ailments.	70%
Fiscal year in which Newco has sold or otherwise placed in service eight devices for the non-invasive treatment of kidney stone or similar ailments.	65%
Fiscal year in which Newco has sold or otherwise placed in service nine devices for the non-invasive treatment of kidney stone or similar ailments.	60%

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or otherwise ... in service 10 or more devices ...or the non-invasive treatment of kidney stone or similar ailments.

8. Newco's Certificate of Incorporation shall provide that it may not be amended except upon the vote or consent by the holders of not less than 85% of the shares of its capital stock outstanding. Such Certificate of Incorporation shall also reflect the requirements for greater than majority shareholder vote or consent reflected herein.

9. The requirements for greater than majority shareholder voting or consent provided for in paragraphs 2, 7, 8 and 11 shall terminate at such time as Newco has consummated a sale of its common stock to the public through an SEC registered offering.

10. Hammond agrees that in the event he enters into any option for or obtains any rights or invents any technology applicable to the non-invasive treatment of kidney stone or similar ailments, he will contribute his option, rights or invention to Newco.

11. Hammond agrees to prepare a comprehensive business plan for Newco's first two years of operations by not later than five weeks after the date when Newco first acquires any rights to technology for the non-invasive treatment of kidney stone and similar ailments. The approval of Put Holders shall be required prior to implementation of the business plan and Put Holders agree not to unreasonably withhold their consent thereto. No material deviation from the business plan as approved shall be made except

shares of capital stock of Newco outstanding at the time such vote or consent is sought. Subscribers agree that within three weeks from the date of this Agreement the subscribers listed at letters (a)-(f) of paragraph 1 shall hold preliminary discussions for the purpose of agreeing on the general business strategies of Newco to be employed prior to implementation of the business plan and Hammond agrees to cause Newco to be operated in accordance with such business strategy pending implementation of the business plan.

12. Newco shall not commence any activity for the sale of its securities through a public offering registered with the SEC or for any business combination or sale of substantially all of its assets unless the consent thereto is obtained from the Put Holders and if elected by Put Holders, Put Holders shall have the right to appoint a representative to manage the activities of Newco in connection with either who is acceptable to Hammond in the exercise of reasonable judgment. Put Holders agree not to unreasonably withhold consent to proposals for public offerings, business combinations and sales of assets. Put Holders hereby consent to any public offering that raises not less than $6,666,000 gross proceeds for not more than 20% of the common stock of Newco to be outstanding after consummation of such public offering.

13. Each subscriber represents and acknowledges to Newco and each of the other subscribers as follows:

(a) Subscriber understands that he is an initial purchaser of Newco's securities, and that none are now outstanding.

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and is not now actively engaged in business.

(c) Subscriber understands that Newco will be required to raise substantial funds in order to be able to commence business and that there is no assurance that it will be successful in such undertaking.

(d) Subscriber has been involved in the initiation of Newco and its proposed activities and has worked with the other persons so involved who are also initial subscribers and, accordingly, Subscriber has had access to all information relevant to an investment decision as to the shares of Newco.

(e) Subscriber understands that the shares he is to receive are restricted, are not registered with the SEC or qualified under applicable state law and that his investment will be illiquid for an indeterminate period of time. Subscriber is taking these shares for investment, solely for his own account, not with a view to distribution, and understands that the shares will be subject to an investment letter, the content of which will be determined solely by Newco which will reflect the facts stated in this subparagraph and provide for restriction on resale of these shares.

(f) Subscriber understands that for the reasons hereinbefore stated and due to the risks associated with companies having no prior operating history, his

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has sufficient net worth and sufficient liquid assets to sustain such a loss without hardship.

(g) Subscriber understands that if full payment is not made for his shares within sixty days from the date hereof, the Board of Directors of Newco may at anytime thereafter cancel his purchase, return any payment he has made and Subscriber agrees in that event he shall have no rights to any of the capital stock of Newco and no claim against Newco related thereto.

14. Subscribers agree that Hammond and Put Holders shall jointly select certified public accountants to be employed by Newco, provided such accountants shall be chosen from among those who are generally available in the location of the principal office of Newco. Any Subscribers who are also directors of Newco agree to vote as directors to carry out the intent of this provision. This provision shall be of no further force or effect after Newco has consummated a sale of its securities to the public through an SEC registered offering.

15. As used in this Agreement the term "Commencement Date" shall mean the earlier of:

(a) The date on which the first device for the non-invasive treatment of kidney stones in which Newco has any rights is first utilized to treat human patients; or

(b) the date such device could have been used for the treatment of human patients under the Federal Food Drug and Cosmetic Act or applicable state law and the regulations promulgated under each.

16. This Subscription Agreement shall be effective when executed by Subscribers identified at letters (a)-(f) of paragraph 1.

IN WITNESS WHEREOF the parties hereto have executed this Subscription Agreement as of the date first set forth above.

Gaines W. Hammond Jr. M.D.
Gaines W. Hammond Jr. M.D.

Errol Payne

Richard Penfil M.D.

Charles McGregor

Thomas A. Evins
Thomas A. Evins, Esq.

Alan S. Kramer, Esq.

Gary P. Clisham

David Blunt

Tom Gardner

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LETTER OF AGREEMENT

THIS LETTER OF AGREEMENTis entered into on this the sixth day of November, 1984, by and between Dr. Gerald L. Wallace (hereinafter called Wallace) and Dr. Gaines W. Hammond, Jr., and Hammond Technologies, Inc.,a Delaware corporation (who are jointly hereinafter referred to as Hammond), for the mutual benefit, considerations, and agreements set forth below:

1. Dr. Gaines W. Hammond, Jr., M.D., is currently the owner of 57% of the issued, outstanding, and unencumbered stock of Hammond Technologies, Inc. a Delaware corporation. Hammond hereby gives to Wallace, or Wallace's designee, the option to purchase 28 1/2% of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc., a Delaware corporation, for the purchase price of One Million and No/100 ($1,000,000.00) Dollars. Such option may be exercised by Wallace within thirty (30) days of the date of this Letter of Agree Upon this option being exercised by Wallace the sum of Five Hundred Thousand and No/100 ($500,000.00) Dollars shall be paid to Dr. Gaines W. Hammond, Jr. at closing and the balance of Five Hundred Thousand and No/100 ($500,000.00) Dollars shall be paid six (6) months from th date of closing. The date of closing shall be on a date to be mutual agreed upon by Wallace and Hammond within ninety (90) days of the dat of this Letter of Agreement.

2. Wallace agrees to furnish, or secure the furnishing of, a Letter of Credit in the sum of Four Hundred Thousand and No/100 ($400,000.00) Dollars to assist in the sale of one I.D.E. lithotripte

machine to Michael Reese Hospital in Chicago, Illinois. The terms of such Letter of Credit are to be mutually agreed upon by Wallace and Hammond.

3. It is agreed that when a second I.D.E. lithotripter machine is sold to a third party (other than either Wallace or Hammond) that from the sale price of such second I.D.E. lithotripter machine the sum of Four Hundred Thousand and No/100 ($400,000.00) Dollars shall be deposited in an escrow account to secure the requirements of the Michael Reese Hospital sale and upon such escrow account being established that the Letter of Credit referred to in paragraph 2 above will be released and of no further force or effect.

4. Wallace, or Wallace's designee, shall have the right and options to purchase the following machines:

a. Five I.D.E. machines are proposed to be manufactured initially. The first of those five I.D.E. machines will be the machin purchased by Michael Reese Hospital in Chicago, Illinois. Wallace, or Wallace's designee, shall have the right and option to purchase the second of such five initial I.D.E. machines.

b. It is further anticipated that a second five I.D.E. machines will be manufactured (i.e., machines numbered 6 through 10) within the reasonable future. Wallace, or Wallace's designee, shall have the right and option to purchase two of such second five machines.

c. After the initial ten I.D.E. machines it is anticipated that additional machines (hereinafter called "PMA Machines") shall be manufactured. Wallace, or Wallace's designee, shall have the right and option to purchase two of such PMA Machines.

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d. In exercising the options to purchase all the machines referred to paragraphs a, b, and c, above, Wallace shall serve as a wholesaler and shall have the right to purchase such machines for the wholesale cost equal to the actual cost of manufacturing and producing such machines. It is agreed that Wallace may then sell such machines at a retail price to be not less than $800,000.00 per machine.

5. It is understood that the location for the manufacturing of the I.D.E. and PMA machines and the site for the location of the principal office of Hammond Technologies, Inc. has not yet been determined. Wallace and Hammond agree to explore all viable options to determine the location of the best site for the manufacturing of such machines and for the principal business office of such corporatio

6. It is agreed that not more than one I.D.E. machine or one PMA machine shall be located within any geographic area consisting of a 200 mile radius of the location of each such machine. Provided, how that Wallace shall be exempt from such 200 mile radius limitation and may place more than one of any such machine within any given 200 mile goegraphic radius if, in Wallace's sole judgment, patient needs justif the placement of more than one such machine within any given 200 mile radius.

7. It is agreed, in principle, that a separate entity, yet to be determined, will be formed for the purpose of supplying software and metabolic evaluation and follow-up care for patients who utilize the services of the I.D.E. and PMA machines. At the present time it is contemplated that the name of such separate entity may be Nephrocare and that the services furnished by such separate entity will be on a

contract basis through Hammond Techonologies, Inc. It is further agreed that Dr. Gerald L. Wallace and Dr. Gaines W. Hammond, Jr., shall determine the ownership and organization of such separate entity.

8. It is understood that Hammond Technologies, Inc. is or may be in the need of securing operating capital. Wallace agrees to assist in locating a viable source of financing operating capital for Hammond Techonologies, Inc. in the range of apprxoimately $500,000.00.

9. It is understood that Dr. Gaines W. Hammond, Jr. has incurred travel and legal expenses in a sum estimated to be approximately $25,000.00 to $30,000.00 in the pursuit of the business interest of Hammond Techinologies, Inc. It is agreed that Dr. Gaines W. Hammond, Jr. shall be reimbursed such out-of-pocket expenses incurred by him prior to the date of this Letter of Agreement out of the operating capita of Hammond Technologies, Inc. The reimubrsement of such expenses is to be supported by vouchers of other documents submitted by Dr. Gaines W. Hammond, Jr., in support of such expenses incurred.

10. It is recognized that at the present time that Dr. Gaines W. Hammond, Jr. is the sole and exclusive owner of 57% of the issued, outstanding, and unencumbered stock of Hammond Techonologies, Inc. 28 1/2% of such stock is subject to Wallace's option given in paragraph 1 above. As to the remaining 28 1/2% of Dr. Gaines W. Hammond, Jr.'s stock, the following rights and options shall apply:

a. At the end of eighteen months from the date of this Letter of AgreementDr. Gaines W. Hammond, Jr. shall have the option to sell to Wallace, or Wallace's designee, all of Dr. Gaines W. Hammond, Jr.'s remaining 28 1/2% of the outstanding, issued, and unencumbered

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stock of Hammond Technologies, Inc. Upon the exercise of such option to sell by Dr. Hammond, Wallace, or Wallace's designee, shall have the obligation to purchase such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

b. At the end of eighteen months from the date of this Lett of Agreement Dr. Gerald L. Wallace, or his designee, shall have the option to purchase all of Dr. Gaines W. Hammond, Jr.'s remaining 28 1 of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc. Upon the exercise of this option to purchase by Dr. Walalce, or Wallace's designee, Dr. Hammond shall have the obligation to sell such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

c. In the event neither of the eighteen month options set forth in paragraph a or paragraph b above is exercised, then at the end of twenty-four months from the date of this Letter of Agreement Dr. Gaines W. Hammond, Jr. shall have the option to sell to Wallace, Wallace's designee, all of Dr. Gaines W. Hammond, Jr.'s remaining 28 of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc. Upon the exercise of such option to sell by Dr. Hammond Wallace, or Wallace's designee, shall have the obligation to purchase such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

d. In the event neither of the options referred to in paragr a or b above is exercised, then at the end of twenty-four months fro the dateof this Letter of Agreement Dr. Gerald L. Wallace, or his desig

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shall have the option to purchase all of Dr. Gaines W. Hammond, Jr.'s remaining 28 1/2% of the outstanding, issued, and unencumbered stock of Hammond Technologies, Inc. Upon the exercise of such option to purchase by Dr. Wallace, or his designee, Dr. Hammond shall have the obligation to sell such outstanding 28 1/2% of said stock at the purchase price hereinafter set forth.

e. The purchase price for such 28 1/2% of the stock of Hammond Technologies, Inc., upon the exercise of any of the above options, shall be equal to the net earnings of Hammond Technologies, I: times seven, times 28 1/2%. The purchase price is to be paid in cash upon closing and the closing is to be held on a mutually agreeable date within ninety days of the date of the exercise of such option.

WITNESS:

_____ _____

DR. GERALD L. WALLACE

WITNESS: HAMMOND TECHNOLOGIES, INC.

_____ By: _____

GAINES W. HAMMOND, JR., M.D.
Its President

WITNESS:

_____ _____

DR. GAINES W. HAMMOND, JR., individual

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SUBSCRIPTION AGREEMENT

This Amendment to Subscription Agreement is made as of November 9, 1984.

1. The undersigned (other than Gerald L. Wallace) have caused the formation of a Delaware Corporation named Hammond Technologies, Inc. ("HTI"), subscribed to its capital stock and entered into certain other agreements in a subscription agreement made as of August 30, 1984. The signatories thereto hereby abrogate the August 30, 1984 subscription agreement and with Wallace enter into this Agreement intending thereby to also abrogate all prior agreements and arrangements, whether or not binding on the parties, between Gaines W. Hammond, HTI and Gerald L. Wallace including specifically the latter agreement dated November 6, 1984 between Gaines W. Hammond, HTI and Gerald L. Wallace and subsequent documentation by or on behalf of any such parties preceding the date of this Agreement. This agreement contains the only agreements of the parties with respect to HTI and the Technology as defined below.

2. HTI has been formed to commercialize rights to technologies for the non-invasive treatment of kidney stones and similar ailments. For that purpose HTI desires to enter into a license agreement as the successor to the rights of Gaines W. Hammond under an agreement with Errol Payne, Richard Penfil and Charles McGregor dated September 10, 1984 (the "Option Agreement").

EXHIBIT D

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Such license is annexed to the Option Agreement as Exhibit B (the "License Agreement"). The License Agreement pertains to a certain extracorporeal shock wave lithotripsy technology ("Technology"). Upon entering into the License Agreement HTI intends to utilize the Technology, subject to applicable law, to commercialize devices based thereon (the "Device" or "Devices"). The parties agree that the Option Agreement has terminated persuant to its terms, however Payne, Penfil and McGregor agree that by execution of this Subscription Agreement, directly or through their attorney-in-fact, they hereby acknowledge the right of HTI to enter into the License Agreement, which upon being executed on behalf of HTI, shall be binding upon them in accordance with its terms.

3. Hammond paid to Payne, Penfil and McGregor the sum of $75,000 pursuant to the Option Agreement. HTI agrees as follows with respect thereto.

(a) Within 10 days of the consummation of an agreement between HTI, Michael Reese Second Century Foundation and Michael Reese Hospital and Medical Center dated on or about November 12, 1984, for the sale by HTI of a Device and for other purposes ("MRH Agreement"), HTI shall pay to Hammond the sum of $25,000.

(b) Ten days after receipt of the proceeds from the sale of the third Device after issuance of an FDA Investigational Device Exemption ("IDE"), and ten days after receipt of the proceeds from the sale of the fifth Device after issuance of an IDE, HTI shall in each instance pay to Hammond the sum of $20,000 for a total of $40,000.

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(c) The remaining balance paid by Hammond under the Option Agreement, namely the sum of $10,000 may be applied in fulfillment of his subscription payment obligations hereunder.

4. Wallace agrees to procure a Letter of Credit ("Letter of Credit") not later than noon EST, November 12, 1984 from First National Bank of Mobile, Alabama ("Bank"), in the form annexed hereto as Exhibit A, with Michael Reese Second Century Foundation as beneficiary for which HTI shall be the applicant and which will be guaranteed by Wallace.

5. In consideration of the performance by Wallace of the provisions of paragraph 4, HTI agrees that Wallace or his designee shall have a right of first refusal to purchase the first Device sold after HTI's Devices have received an IDE. HTI will offer such a Device for a sale price not exceeding $800,000 and on such other terms as HTI determines. Such terms shall be available for Wallace to accept for a period of ten days after being provided to him. Notwithstanding the preceding, HTI shall not be required to offer such right of first refusal to Wallace in the event Michael Reese Second Century Foundation should object to the placement of the first Device as directed by Wallace, under the provisions of section 7.7 of the MRH agreement.

6. Further HTI agrees that from proceeds of the first sale of a Device after the issuance of an IDE, whether or not to Wallace, HTI shall deposit $400,000 with the Bank or such lesser sum as is required to procure the release of Wallace as a guarantor of the Letter of Credit.

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7. The undersigned hereby subscribe to the number of shares of common stock of HTI set forth below at $1.00 per share. Payment for the shares shall be made within 20 days from the date hereof and no shares shall be issued to an undersigned until he has paid for his shares in full.

	NAME AND ADDRESS OF SUBSCRIBER	NUMBER OF SHARES
(a)	Gaines W. Hammond Jr., M.D. ("Hammond") 145 Dillon Drive Spartanburg, South Carolina 29302	10,000
(b)	Errol Payne ("Payne") c/o Design West 2532 Dupont Drive Irvine, California 92715	10,000*
(c)	Richard Penfil M.D. ("Penfil") P.O. Box 5660 Balboa Island, California 92662	20,000*
(d)	Charles McGregor ("McGregor") c/o Design West 2532 Dupont Drive Irvine, California 92715	5,000*
(e)	Thomas A. Evins, Esq. as agent for Butler, Means, Evins & Browne 205 Magnolia Street Spartanburg, South Carolina 29304	7,500
(f)	Alan S. Kramer, Esq. 11 East 44th Street New York, New York 10017	10,500
(g)	Gerald L. Wallace 3715 Dauphin Street Suite 7e Mobile, Alabama 36608	10,000

*or between such three parties as they determine including adding John Chandronait as a subscriber.

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(h) Gary Clisham*

(i) David Blunt*

(j) Tom Gardner*

8. No shareholder of HTI shall have any preemptive rights nor otherwise be protected against dilution of his interest in its capital stock; provided however HTI shall not issue any of its securities to any of its shareholders unless all shareholders are offered an opportunity to purchase such securities of the corporation on the same terms, or a percentage of such securities on the same terms equal to their then percentage interest in the capital stock of HTI should shareholders in the aggregate desire to purchase a greater number of such securities than are offered. This provision shall terminate at such time as any of the capital stock of HTI has been registered with the Securities and Exchange Commission and shall not apply to Securities issued pursuant to section 9(b).

9. The undersigned hereby reserve from the authorized but unissued common stock of HTI the following shares for the following purposes.

(a) 15,000 common shares for a private placement to raise up to $5,000,000 in gross proceeds; and,

* In the aggregate 5000 shares to be allocated by Clisham; addresses to be furnished.

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(b) 7,000 shares to underlie an Incentive Stock Option Plan meeting the requirements of the Internal Revenue Code, to be adopted by HTI.

10. Each subscriber represents and acknowledges to HTI and each of the other subscribers as follows:

(a) Subscriber understands that he is an initial purchaser of HTI's securities, and that none are now outstanding.

(b) Subscriber understands that HTI has no history and is not now actively engaged in business.

(c) Subscriber understands that HTI will be required to raise substantial funds in order to be able to commence business and that there is no assurance that it will be successful in such undertaking.

(d) Subscriber has either been involved in the initiation of HTI and its proposed activities and has worked with the other persons so involved who are also initial subscribers or has conducted such investigation of HTI and its prospects and affairs, including the opportunity to question the other subscribers, as he deemed appropriate and, accordingly, Subscriber has had access to all information relevant to an investment decision as to the shares of HTI and the other provisions hereof.

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(e) Subscriber has reviewed the terms of the Option Agreement with its exhibits including the License Agreement and Sublicense Agreement between HTI and Medstone, Inc. and the terms of the November 9, 1984 draft of the MRH Agreement. The agreements of Subscriber hereunder are made in light of the terms thereof.

(f) Subscriber understands that the shares he is to receive are restricted, are not registered with the SEC or qualified under applicable state law and that his investment will be illiquid for an indeterminate period of time. Subscriber is taking these shares for investment, solely for his own account, not with a view to distribution, and understands that the shares will be subject to an investment letter, the content of which will be determined solely by HTI which will reflect the facts stated in this subparagraph and provide for restriction on resale of these shares.

(g) Subscriber understands that for the reasons hereinbefore stated and due to the risks associated with companies having no prior operating history, his entire investment and the other undertakings of HTI hereunder may become worthless. Subscriber has sufficient net worth and sufficient liquid assets to sustain such a loss without hardship.

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(h) Subscriber understands that if full payment is not made for his shares within twenty days from the date hereof, the Board of Directors of HTI may at anytime thereafter cancel his purchase, return any payment he has made and Subscriber agrees in that event he shall have no rights to any of the capital stock of HTI and no claim against HTI related thereto.

11. This Subscription Agreement shall be effective when executed by Subscribers identified at letters (a)-(g) of paragraph 7.

IN WITNESS WHEREOF the parties hereto have executed this Subscription Agreement as of the date first set forth above.

Gary P. Clisham

David Blunt

Tom Gardner

Hammond Technologies, Inc.

By: Gaines W. Hammond Jr. M.D.

Gaines W. Hammond Jr. M.D.

Errol Payne

Richard Penfil M.D.

Charles McGregor

Thomas A. Evins, Esq.

Alan S. Kramer, Esq.

Gerald L. Wallace

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